77-1029

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1445

AMBROSE W. J. CLAY
Petitioner

VS

ROBERT L. BOMAR, JR., M.D.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SIXTH CIRCUIT CINCINNATI, OHIO

AMBROSE W.J. CLAY
PRO SE
P.O. BOX 22642
NASHVILLE, TENN. 37202

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THE FOLLOWING OPINIONS WERE NOT REPORTED:

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMBROSE W. J. CLAY	:	Dec. 2, 1976
v.	:	No. 76-310-NA-CV
ROBERT L. BOMAR, JR., M.D.	:	

ORDER

In accordance with the Memorandum contemporaneously filed, it is ORDERED that this case is dismissed.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMBROSE W. J. CLAY	:	Dec. 2, 1976
v.	:	No. 76-310-NA-CV
ROBERT L. BOMAR, JR., M.D.	:	

MEMORANDUM

This civil action was filed by plaintiff Ambrose W. J. Clay, against Robert L. Bomar, Jr., M.D., seeking damages in the total amount of $17,000.00. The complaint alleged no jurisdictional grounds, but alleged generally that defendant, a physician employed at the Veterans Administration Hospital, Nashville, Tennessee, had prepared a memorandum, the content of which plaintiff alleged would affect him adversely

in his capacity as an employee at the Veterans Administration Hospital. Plaintiff further alleged that the defendant had acted beyond the scope of his authority and that the content of the memorandum was untrue.

Defendant filed a motion to dismiss the complaint, or in the alternative, for a more definite statement. The grounds for defendant's motion to dismiss were that the Court lacked jurisdiction over the subject matter of the complaint and that the complaint failed to state a claim upon which relief can be granted.

Defendant's motion to dismiss was argued before the Court on November 10, 1976. On that date in open court, plaintiff stated that it was his intention to sue defendant personally, that he did not intend to make an employment complaint against the Veterans Administration, and that he did not intend to pursue any available administrative remedies within the Veterans Administration. Plaintiff expressly alleged that defendant was acting beyond the scope of his employment at the times complained of in the complaint.

Plaintiff having clarified the allegations of his complaint in the above manner, it is clear that this Court has no jurisdiction of the subject matter of the complaint. Plaintiff is attempting to bring a common law libel action against defendant, and such an action may not be brought in this Court.

The United States Supreme Court has held that a person's interest in his reputation is simply one of a number of interests which a state may protect against injury by virtue of its tort law. Any harm to that interest, even when inflicted by an officer of the state, does not rise to a deprivation of "liberty" or "property" protected by federal law. See *Paul v. Davis*, _____ U.S. _____, 47 L.Ed 2d 405 at 420 (1976).

Although *Paul v. Davis* was specifically concerned with an action brought pursuant to Title 42, United States Code, Section 1983, its principle are applicable to this case. Here defendant's alleged actions are not alleged to be attributable to the government agency by which he is employed or to be otherwise under color of law. Thus it is absolutely clear that the subject matter of the complaint does not present a federal question or arise under the Constitution or laws of the United States. It is merely a tort action between private litigants.

Furthermore, there is no diversity jurisdiction, in that both plaintiff and defendant are residents of the state of Tennessee.

Accordingly, this civil action is dismissed.

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

AMBROSE W. J. CLAY	:	May 3, 1977
v.	:	No. 76-310-NA-CV
ROBERT L. BOMAR, JR., M.D.	:	

ORDER

Based upon authority granted under Rule 11(d) of the Federal Rules of Appellate Procedure, it is hereby ORDERED that the time for filing and docketing the record on appeal herein be extended to and including July 21, 1977.

ENTER:

_____

UNITED STATES DISTRICT JUDGE

No. 77-8036

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMBROSE W. J. CLAY
Petitioner

V.

ORDER
May 3, 1977

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF TENNESSEE
Respondent

Before: WEICK, EDWARDS and ENGEL, Circuit Judges

Petitioner's motion in this court is construed as a petition for writ of mandamus to compel the district court to empanel a jury and have his complaint filed therein considered on the merits.

Because the district court, holding that the complaint stated a claim cognizable only in the state courts, entered a final judgment of dismissal, a direct appeal from that decision was available to appellant and his motion is without merit. Mandamus will not be granted to review issues which may be raised on direct appeal.

The petition is denied.

ENTERED BY ORDEROF THE COURT

Clerk

NO. 77-1445

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMBROSE W. J. CLAY
Plaintiff-Appellant

V.

ROBERT L. BOMAR, JR., M.D.
Defendant-Appellee

Nov. 3, 1977

ORDER

Before: PECK, LIVELY, and ENGEL, Circuit Judges

Plaintiff-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk of Court

77-1445

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMBROSE W. J. CLAY Plaintiff-Appellant	:	Sept. 23, 1977
vs.	:	ORDER
ROBERT L. BOMAR, JR., M.D. Defendant-Appellee	:	

Before: PECK, LIVELY, and ENGEL, Circuit Judges

This matter is before the Court upon consideration of the motion by the United States pursuant to Rule 8, Rules of the Sixth Circuit, to dismiss the appeal for lack of jurisdiction because of an untimely filed notice of appeal.

It appears from the record that the United States, an officer or agency of the United States is not a party to this cause and the United States is without standing to file the motion to dismiss, and accordingly, it is ORDERED that the motion be and is hereby denied.

It further appears from the record that appellant failed to timely file his notice of appeal as required by Rule 4 (a), Federal Rules of Appellate Procedure, and there is no finding by the District Court that excusable neglect would allow an extension of the 30-day period.

The timely filing of a notice of appeal in compliance with Rule 4(a), Federal Rules of Appellate Procedure, is mandatory and jurisdictional which cannot be waived or extended by this Court. *Levisa Stone Corp. v. Elkhorn Stone Co.*, 411 F.2d 1208 (6th Cir. 1969), cert. den., 397 U.S. 925 (1970); Rule 26(b), Federal Rules of Appellate Procedure. Accordingly, the Court concludes the appeal must be dismissed for lack of jurisdiction, pursuant to Sixth Circuit Rule 8.

Accordingly, it is ORDERED that the appeal be and hereby is dismissed.

ENTERED BY ORDER OF THE COURT

_____

Clerk

CASE CITATIONS

Cases:

Sioux City & P. Ry. Co. v. Stout, 1874-17 Wall 657, 664, 21 L. Ed2d 745

Edwards v. Elliott, 21 Wall. (88 U.S.) 532, 557 (1874); *Pearson v. Yewdall, 95 U.S. 294*, 296 (1877)

Branham v. Commonwealth, 209 Ky. 273 S.W. 489, 490

Walker v. Sauvinet. 92 U.S. 90 (1876), *Coates v. Lawrence*, D.C. Ga. 46 F. Supl. 414, 423

JURISDICTION:

Article III. Sec. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .

United Steelworkers v. United States, 361 U.S. 39 (1959) 29

FEDERAL STATUTES 28 (U.S.C.) Sec. 165(a) July 25, 1958 Pub. L. 85-554 Sec. 1, et seq. 72 Stat. 415, June 25, 1948, Note Title 28 U.S.C. 2102(c)

QUESTIONS PRESENTED:

No. 1. Does the district court, has the right to deny the appellant the right to a jury trial under the Constitution of the United States of America?

No. 2. Does the district court has the right to deny the appellant's motion for default judgment and for granting same, according to the law, when the appellee did not respond to original complaint, according to the time prescribed by law, and offered no grounds whatsoever, for not doing so.

No. 3. Does the Appellate Court has the right to waive its responsibility under the provision of Title 28 Sec. 1331, to command jurisdiction over a Federal question?

No. 4. Does the Appellate Court has the right to waive the provisions of Rule 4. (a) paragraph (2) under Rule 52(b) Rules of Appellate Procedure?

CONSTITUTIONAL PROVISONS INVOLVED:

The Seventh amendment to the Federal Constitution of the United States is involved, and the provisions and rights guaranteed under it.

ISSUES INVOLVED:

1. Should the district court denied the appellant the right to a jury trial on demand, and as provided by the 7th amendment to the Const. of the United States?

2. If the United States, an officer or agency is not a party to this complaint, and, is without standing to file a motion to dismiss, motion being denied, than it appears that the case should have been remanded for lack of representation on the part of the defendant. (The Supreme Court should decided the issue of whether the United States Government may represent a party, when the United States is not party to the Complaint)

3. Should the district court deny the appellant motion for default judgment, when such motion was timely filed, and the defendant deliberately failed to respond to appellant's complaint within the time prescribed by law?

4. Should the Appellate Court of Appeals by narrow and strained manipulation of a rule of The Rules of Federal procedure, deny the benefit of this to rule to appellant, when in fact, the appellant abided by this rule in the proceedings of the district court?

As to Issue No. 1. See paragraph (1) Brief and Argument, Infra

As to Issue No. 2. This is a new issue, never before presented to the Court, and therefore the Supreme Court should decide this issue.

As to Issue No. 3.

The district court erred when it failed to grant the motion for default judgment, on the basis of the pleadings. The defendant failed to answer the complaint within the time prescribed by law. When such motion is made, and a party is entitled to judgment, the Court is responsible to give judgment. N.Y. Code Civ. Proc Sec. 547 Sternbergy v. Levy. 159 Mo. 617, 60 S.W. 1114, 53 L.R.A. 438(1900) Le Breton v. Stanley Contracting Co., 15 Cal. App. 429, 114 P. 1028 (1911)

The summon required the defendant answer within 20 days after being served, the defendant failed to do this. The United States answered after the 20 days, but had no authority to do this, not being a party to the complaint. (see Statement of the case paragraph 11 infra)

As to issue No. 4.

See paragraph 12, Statement of the case infra. Par. 6 Argument and Authorities. It is therefore submitted that the Courts erred regarding these issues, herein above stated.

STATEMENT OF THE CASE

This is a direct appeal by the plaintiff-appellant from an adverse final decree entered by the United States District Court for the middle district of Tennessee, Nashville Division, the Honorable L. Clure Morton presiding, in open Court on November 10, 1976, at which time the appellant cited the law which gave the Court jurisdiction in this case, and in open Court moved the Court for a jury trial according to the Seventh Amendment to the Constitution of the United States.

The Court ignoring this motion and averring in open Court that this case was an attempt by plaintiff to bring a common law libel action against defendant, and that such an action may not be brought in his Court.

The plaintiff-appellant reiterated in open Court that his original complaint contained issues of facts, and only facts, and that his suit was a suit for damages for injuries received as complaint clearly showed that his case was not a libel action as the Court alleged, and, whereupon, the Court instructed the Court reporter to write a memorandum dictated by the Court, purporting to show that the Court has no jurisdiction in this case, and that an order would be entered and contemporaneously filed dismissing this case.

On December 2, 1976, the Court subsequently ordered the case dismissed, by filing with the Clerk an Order and

memorandum purporting to show that this case was a libel action.

The appellant was very aggrieved of the Court's action, and utilized all of the rules of law to keep his case legally alive, and, after which, on April 22, a notice of appeal and, cost bond was simultaneously filed and entered. On April 25, 1977, appellant moved the Court for an Order requiring the Court Reporter to filed a certified record of the transcript of the proceedings of November 10, 1976. This motion was denied.

On April 29, 1977, the Court Reporter filed a certified record of the proceeding. On May 2, 1977, the plaintiff-appellant moved the Court for extension of time in which to order transcript from the Court reporter, for filing and docketing the record on appeal to the Sixth Circuit Court of Appeals, Cincinnati, Ohio.

On May 3, 1977, the court Ordered that the time for filing and docketing the record on appeal herein be extended to and including July 21, 1977. Case Notice No. 12.

On May 4, 1977, plaintiff-appellant filed a Petition with the Sixth Circuit Court of Appeals for writ of mandamus to compel the district court to empanel a bi-racial jury to hear the case. The Sixth Court denied this petition.

On July 12, 1977, the record was transmitted by mail to the Sixth Circuit Court of Appeals, Cincinnati, Ohio.

On August 11, 1977, the United States Government by its Attorney, filed a motion in behalf of defendant-appellee, to dismiss, and memorandum of law in support of motion to dismiss.

On August 15, 1977, the plaintiff-appellant responded to the motion to strike notice appeal and dismiss by filing with the Sixth Circuit Court of Appeals a motion to overrule motion to strike notice of appeal and to dismiss. Before the Court acted upon the last motion filed by the appellant, on September 22, 1977, the plaintiff-appellant submitted his brief, transmitting 25 copies thereof to the Sixth Circuit Court of Appeals.

The United States Sixth Circuit of Appeals, in the meantime, on September 23, 1977, entered an order dismissing the United States Motion to strike notice of appeal, saying:

"It appears from the record that the United States, an officer or agency of the United States is not a party to this cause and the United States is without standing to file the

motion to dismiss, and accordingly, it is ORDERED that motion be and is hereby denied."

At the same time, the Court, dismissed plaintiff-appellant case on the ground that appellant failed to timely file his notice of appeal as required by Rule 4(a), Federal Rules of Appellate Procedure, to which the appellant excepted.

And, whereupon the appellant petitioned the Court for a hearing en banc.

This petition was filed on September 28, 1977. The Court denied this petition on November 3, 1977. On November 22, 1977, a petition was filed with the Clerk of the Supreme Court of the United States for transmitting the same to one of the Justices of the Supreme Court for an extension of time in which to file a petition for writ of certiorari.

On November the 29, 1977, the Clerk of the Supreme Court of the United States informed the appellant that he had ninety (90) days from the date rehearing was denied by the United States Court of Appeals for the Sixth Circuit in which to file his petition for writ of certiorari in the Supreme Court.

It is very clear that the court of appeals has decided (by dismissing the United States Motion to dismiss) an important question of federal law which has not been, but should be, settled by this Court, and further, the court of appeals has decided a federal question respecting the Constitutional rights to a jury trial, in a way in conflict with applicable decisions of this court, respecting this right.

ARGUMENT AND AUTHORITIES

An individual or citizen pro se complaint, is a right, that must not be abridged, and particularly when said complaint deals with factual materials, and when a demand is made for a jury trial. U.S.C.A. Const. Amend. 7, CARL v. DE TOFFOL 25 N.W.2d 279 PEARSON v. YEWDALL. Sup. Ct. 297, Oct. 1877. WRIGHT & MILLER, Federal Practice and Procedure; Civil Sec. 2301-2307

The Court of Appeals was in error, when it dismissed this case alleging no jurisdictions. The Jurisdiction of a Court of Appeals is embodied in the U.S.C.A. Const. Art. 3, Sec. 1, and 451 of Title 28, and particularly, when a Federal question is involved. Title 28 Sec. 1331.

The right to be heard by a jury in a Federal Court has always been a protected right under the Constitution of the

United States, supra PEARSON v. YEWDALL.

The Court of Appeals erred in denying the appellant his rights under the due process clauses of the Fourteen Amendment to the Constitution of the United States. The right to be heard by a Jury on demand, is a due process clause affecting the rights of citizens. In this demand, the appellant, requested a bi-racial jury, for an equitable resolution of the case.

It was error, for the Court of Appeals to reduce the benefit of the Federal Rules of Appellate Procedure to which the appellant is entitled.

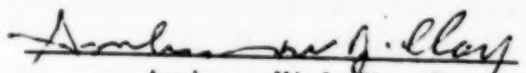
The jurisdictional requirement is waived by paragraph 2 of Rule 4(a), Rules of Appellate Procedure. Quote, "The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules; (2) granting or denying a motion under Rules 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted . . .

The appellant complied with the above rule, as the record will show.

For these and other reasons clearly demonstrated on the records, the petition for a writ of certiorari should be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Sixth Circuit, and after review, the same should be reversed and petitioner's complaint affirmed, and/or the case remanded.



Ambrose W. J. Clay, Pro Se
P.O. Box 22642
Nashville, Tennessee 37202

CERTIFICATE

I hereby certify that three conformed copies of this petition were mailed to Hon. Hal D. Hardin, United States Attorney for the Middle District of Tennessee, at 879 U.C. Courthouse, Nashville, Tennessee, this 17th day of January, 1978.

APPENDIX

PEARSON v. YEWDALL

1. Where a writ of error is defective in the statement of the parties thereto, the right to amend is not absolute, under sect. 1005, Rev. Stat.; but the court, in its discretion, may allow the requisite amendment to be made upon such terms as it may deem just.
2. As both parties severally claim compensation for land taken by the city of Philadelphia for public use, the city, the only adverse party to them in the proceedings below, is an indispensable party to the writ.
3. The court declines to allow an amendment making the city such party, inasmuch as the questions made by the assignment of error have been settled by repeated decisions, and are no longer open to discussion here.
4. The seventh amendment to the Constitution, touching the right of trial by jury, applies only to the courts of the United States.
5. The act of the General Assembly of the State of Pennsylvania, entitled "An Act relating to roads, highways and bridges," approved July 13, 1836, makes ample provision for judicial inquiry into the matters therein mentioned, and is due process of law, within the meaning of the Federal Constitution.

MOTION by the defendant to dismiss the writ of error to the Supreme Court of Pennsylvania, and by the plaintiff to amend the writ, by making the city of Philadelphia a party thereto.

The facts are stated in the opinion of the court.

The motions were argued by *Mr. F. Carroll Brewster* for the plaintiff in error, and by *Mr. William W. Wiltbank* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It having been suggested to us at the last term that the city of Philadelphia was a party to this cause in the court below, and adverse in interest to the plaintiffs in error, leave was granted the defendants in error to move to dismiss this suit, because the city is not named in the writ; and for the city to appear by counsel, to be heard in support of the motion. That motion has now been made; and the plaintiffs in error, while resisting it, ask leave, under sect. 1005 Rev. Stat., to amend their writ by naming the city as a defendant, in case it shall appear to be necessary.

The city councils, by ordinance, ordered that Paschall Street should be opened to public use. Thereupon the present defendants in error, owning property which would be taken by the opening, petitioned the Court of Quarter Sessions, conformably to the act of the General Assembly of Pennsylvania regulating

such proceedings, to appoint proper persons to view the premises and assess their damages. In accordance with this petition, the court appointed a jury of six men to view the premises, and assess the damages which had been sustained. Notice of their appointment and of the time and place they would meet to perform their duties was served upon all the owners of property through which the street would run. Availing themselves of this notice, the plaintiffs in error appeared among others and presented their claims.

Notice of the meeting was also served, in accordance with the further provisions of the statute, upon the law department of the city; and the solicitor, who was charged by law with the duty of representing and protecting the interests of the city in all such matters, appeared before the jury in his official capacity. The viewers, after a hearing, made a report to the court of their allowances to the several claimants. The plaintiffs in error excepted to the report, for the reason, among others, that the amount awarded to them was too small; and the city also excepted, because it was too large. The Court of Quarter Sessions overruled the exceptions of both parties, and confirmed the report. The plaintiffs in error then appealed to the Supreme Court; and the report being there again confirmed, they now seek to bring the case here for review upon this writ.

There can be no doubt but that the city is an indispensable party to this suit. The viewers were appointed at the instance of the defendants in error; but they were appointed in a proceeding by the city, in its nature adverse to all the property owners affected, for an appropriation of private property to public use. It nowhere appears that the interests of the plaintiffs in error are adverse to those of the defendants in error. They were both property owners, and both seeking compensation for their property before it should be opened to the use of the public. The city alone represented the public, and was, therefore, the only party to the proceeding adverse to the claimants. Under such circumstances, we cannot properly review the judgment below in its adsence.

The question now arises, whether the plaintiffs in error shall have leave to amend. Sect. 1005 of the Revised Statutes authorizes this court in its discretion, and upon such terms as it may deem just, to allow an amendment of a writ of error when the statement of the parties thereto is defective. The right of a party to amend is not absolute, but it is to be granted by the court in its discretion. Whether it should be granted in a particular case must depend upon the attending circumstances.

In this case, we think the amendment ought not to be allowed. We have looked carefully through the record, and cannot find that any question is presented which has not been many times decided. We have held over and over again that art. 7 of the amendments to the Constitution of the United States relating to trials by jury applies only to the courts of the United States, *Edwards v. Elliott*, 21 Wall. 557; and in the act of the General Assembly of Pennsylvania, now under consideration, ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal Constitution. To grant the amendment would, in our opinion, lead only to unnecessary delay and expense.

Writ dismissed.

WALKER v. WAINWRIGHT

Per Curiam.

WALKER v. WAINWRIGHT, CORRECTIONS DIRECTOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 786, Misc. Decided March 11, 1968.

Petitioner, under life sentence for murder, was later sentenced to five years for assault, to commence when he had completed the murder sentence. Petitioner challenged the murder conviction on constitutional grounds, but the District Court denied a writ of habeas corpus on the sole ground that, in view of the sentence for assault, a favorable decision would not result in the petitioner's immediate release from prison, and that the court was therefore powerless to consider his claims. The Court of Appeals rejected his application for a certificate of probable cause. *Held*: Whatever its other functions, the writ of habeas corpus is available to test the legality of a prisoner's current detention, and it is immaterial that another prison term might await him if he should establish the unconstitutionality of his present imprisonment.

Certiorari granted; reversed and remanded.

PER CURIAM.

On September 30, 1960, the petitioner was convicted of first degree murder and was sentenced to life imprisonment. On May 25, 1965, he was found guilty of aggravated assault and was sentenced to five years in the state penitentiary, to commence when he had completed serving the sentence for murder.

Having attempted without success to challenge his murder conviction on federal constitutional grounds in the state courts, the petitioner sought a writ of habeas corpus in the United States District Court for the Southern District of Florida. He contended that he had been deprived of counsel at his preliminary hearing, that a coerced confession had been used against him at trial, and that he had been denied the right to an effective appeal.

The District Court observed that, even if the petitioner's contentions were accepted and his murder convictions were accepted and his murder conviction reversed, he would still face a five-year prison term for aggravated assault. Because a favorable decision on the murder conviction would not result in the petitioner's immediate release from prison, the District Court thought itself powerless to consider the merits of his claims and therefore denied his habeas corpus petition without further consideration. In short, the District Court held that the petitioner could not challenge his life sentence until after he had served it. The United States Court of Appeals for the Fifth Circuit summarily rejected the petitioner's application for a certificate of probable cause, and he then sought review in this Court.

In reaching its conclusion, the District Court relied upon *McNally v Hill*, 293 U. S. 131, for the broad proposition that the "Writ of Habeas Corpus may not be used as a means of securing judicial decision of a question which, even if determined in the prisoner's favor, could not result in his immediate release." The *McNally* decision, however, held only that a prisoner cannot employ federal habeas corpus to attack a "sentence which [he] has not begun to serve." 293 U. S., at 138. Here the District Court has turned that doctrine inside out by telling the petitioner that he cannot attack the life sentence he *has* begun to serve – until after he has finished serving it. We need not consider the continued vitality of the *McNally* holding in this case, for neither *McNally* nor anything else in our jurisprudence can support the extraordinary predicament in which the District Court has placed this petitioner.

Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention. The petitioner is now serving a life sentence

imposed pursuant to a conviction for murder. If, as he contends, that conviction was obtained in violation of the Constitution, then his confinement is unlawful. It is immaterial that *another* prison term might still await him even if he should successfully establish the unconstitutionality of his present imprisonment.

The motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

CARL v. DE TOFFOL
Cite as 25 N.W.2d 479

CARL v. DE TOFFOL et al.
No. 34217.

Supreme Court of Minnesota
Dec. 20, 1946

See 7. Jury 11(5)

Provision of federal Constitution preserving right of trial by jury in courts of the United States is a limitation on the federal government only and not on the states, and applies only to jury trials in federal courts. U.S.C.A.Const. Amend. 7.

No. 77-1029

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMBROSE W. J. CLAY, PETITIONER

v.

ROBERT L. BOMAR, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1029

AMBROSE W. J. CLAY, PETITIONER

v.

ROBERT L. BOMAR, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an employee of the Veterans Administration, filed this action in the United States District Court for the Middle District of Tennessee, alleging that respondent, a VA physician, made libelous statements about him in a hospital memorandum. At the hearing on respondent's motion to dismiss, petitioner stated that he was not asserting a claim against the VA, but that his action was solely against the respondent personally. He added that respondent had acted beyond the scope of his employment in making the allegedly defamatory statements (Pet. App.).

On the basis of these representations, the district court on December 2, 1976, dismissed the action for lack of subject matter jurisdiction (Pet. App.). Petitioner filed a

notice of appeal on April 22, 1977, almost five months after the district court had entered final judgment against him (Pet. 4). The court of appeals dismissed the appeal for failure to file a notice of appeal within the 30-day period provided for in Fed. R. App. P. 4(a).

The decision of the court of appeals is correct. A timely notice of appeal is "mandatory and jurisdictional" under Rule 4(a) and 28 U.S.C. 2107. *United States* v. *Robinson*, 361 U.S. 220, 229. The importance of Rule 4(a) in setting a "definite point of time when litigation shall be at an end" was reaffirmed by this Court in *Browder* v. *Director, Department of Corrections of Illinois*, No. 76-5325, decided January 10, 1978, slip. op. 7. Because the final judgment was entered by the district court on December 2, 1976,[1] the notice of appeal should have been filed by January 3, 1977.[2] Even if petitioner had successfully moved for a 30-day extension on grounds of excusable neglect (Fed. R. App. P. 4(a); 28 U.S.C. 2107), his notice, filed on April 22, 1977, still would have been some 12 weeks late.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

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[1]Petitioner did not file a motion for reconsideration by the district court.

[2]Petitioner did not sue respondent in his official capacity. Accordingly, the 60-day period for filing a notice of appeal in cases in which the United States or a federal agency or officer is a party was inapplicable. See *Michaels* v. *Chappell*, 279 F. 2d 600 (C.A. 9), certiorari denied, 366 U.S. 940; *Hare* v. *Hurwitz*, 248 F. 2d 458 (C.A. 2). In any event, even under the 60-day provision petitioner's notice of appeal would have been untimely.

DOJ-1978-03